



Administrative Conference Recommendation 2018-4

Recusal Rules for Administrative Adjudicators

Adopted December 13, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause, as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.¹ Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.² Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.³ This Recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias.

¹ Louis J. Virelli, III, *Recusal Rules for Administrative Adjudicators* (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

² See 28 U.S.C. § 455(a) (2012); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj>. Both require recusal by federal adjudicators when their “impartiality might reasonably be questioned.”

³ Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.⁴ It also covers appeals from those adjudications. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically conducted by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal

⁴ In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). *See* Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 2* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.



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determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must provide parties with a written explanation of their recusal decisions.⁵ Finally, agencies could provide for the publication of recusal decisions. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish adjudicative recusal rules and procedures from the ethics rules promulgated by the Office of Government Ethics (OGE).⁶ As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules prohibit employees from participating in certain matters when they have a conflict of interest or an appearance of a conflict. Adjudicative recusal rules focus on how an agency, acting through its adjudicators and appeal authorities, decides who will hear certain cases in a manner that ensures the integrity and perceived integrity of adjudicative proceedings. Adjudicative recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need to have clear guidance as to what they may or may not do. Adjudicative recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association.

The enforcement mechanism is also different. If an adjudicator, like other employees, participates in a matter in violation of an ethics rule, the adjudicator can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a case where he or she should have been recused, even if the adjudicator would not be subject to discipline, the decision not to

⁵ 5 U.S.C. § 555(e) (2012).

⁶ The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. App.) established the Office of Government Ethics to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” OGE’s *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.



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recuse could be appealed under whatever process the agency has established. In addition, the recusal process can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.⁷ Under that process, agencies, with the concurrence of OGE, may promulgate ethics rules that supplement existing OGE rules. This Recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

RECOMMENDATION

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA), as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*,⁸ provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
 - a. Improper financial or other personal interest in the decision;
 - b. Personal animus against a party or group to which that party belongs; or
 - c. Prejudgment of the adjudicative facts at issue in the proceeding.

⁷ See Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.105.

⁸ 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
 - a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);
 - b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);
 - c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);
 - d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and
 - e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).
4. Agency rules should include provisions identifying considerations that do not, on their own, warrant recusal and specifying situations in which recusal is not required or is presumptively not required.



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5. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.
6. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions must provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.
7. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.